

**A Ace Polymers (M) Sdn Bhd (in liquidation) v Ketua Pengarah,
Lembaga Kemajuan Ikan Malaysia & Ors**

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21NCC-31 OF
2011
MARY LIM J
9 MARCH 2012

C *Civil Procedure — Mode of commencement of proceedings — Whether by judicial
review or by writ action — Plaintiff complained of defendants' failure to enforce
subsidiary legislation for compulsory use of fish crates of type made by plaintiff —
Whether plaintiff's claim and complaints predominantly concerned public law —
Whether plaintiff correctly ordered to provide security for costs for trial — Whether
defendants not cause of plaintiff's impecuniosity*

E The plaintiff, which initiated the instant action with the sanction of the liquidator, alleged that the first and second defendants had made representations and given assurances that the plaintiff would have the exclusive right to produce and supply insulated crates ('crates') for storing of fish and that laws would be made to make it mandatory for fishermen, importers, suppliers and dealers in fish to use such crates. The plaintiff alleged that in reliance upon those representations/assurances, it bought land and equipment, built a factory, appointed skilled personnel and invested funds to produce the crates.

F The plaintiff claimed that although the defendants had enacted a law ('the subsidiary legislation') to provide that crates used by persons in the fish industry should be of a particular specification, namely, of the type made by the plaintiff, the defendants eventually decided to neither enforce the subsidiary legislation as to the compulsory use of the crates nor allow the plaintiff the exclusive right to produce and supply the crates. The plaintiff claimed that due to the defendants' reneging on their representations and assurances, it suffered serious financial loss that led to its winding up. The plaintiff claimed against the defendants for special damages, loss of profits and general and other damages. The second and third defendants applied (vide encl 9) to strike out the claim under O18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980, inter alia, on the ground that as the second defendant was a public authority, the plaintiff's complaint against his decision could only be properly and validly brought by way of judicial review and not by writ action. To that, the plaintiff replied that it was not seeking to review the defendants' decision in not enforcing the subsidiary legislation nor was it questioning their right to enact the law. Rather, its claim was in private law based on the tort of negligent misrepresentation and of assumption of responsibility for which writ action was the proper mode. The plaintiff also filed an appeal (vide encl 16) against the decision of the senior assistant registrar ('SAR') ordering it to provide

RM90,000 as security for costs pursuant to s 351 of the Companies Act 1965 before the trial of the action. The plaintiff contended that as the first defendant was the cause of the plaintiff's financial predicament in the first place, he should not be allowed to take advantage of the situation by insisting it should provide security for costs.

Held, allowing encl 9 with costs and dismissing encl 16 with no order as to costs:

- (1) When the whole of the plaintiff's claim was properly appreciated, it could be seen that the plaintiff's complaints against the defendants was predominantly housed in public law. The claim and the complaints had to be brought by way of judicial review. This was not a matter of mere technicality but of jurisdiction. The fact that the plaintiff had pleaded its claim in the tort of negligent misrepresentation and assumption of responsibility did not alter this consideration and finding (see paras 17 & 19).
- (2) The essence of the plaintiff's claim was about the defendants' actions in relation to the subsidiary legislation and how the plaintiff was not the exclusive producer and supplier of the crates. The power and authority to enact laws, including subsidiary legislation, were patently matters concerning principles of public law. Even if there was a mixture of public and private law in this case, the plaintiff's complaints contained substantial elements of public law (see paras 20 & 22).
- (3) The plaintiff was a wound up company and there was ample credible evidence that it would not be in a position to settle the first defendant's costs in the event the latter was successful in defending the claim and was awarded costs. The plaintiff already had substantial debts in the region of RM145m and it accepted that it would be unable to pay the first defendant if he was successful (see para 30).
- (4) In balancing the interests of the two parties the court was compelled to find the balance did not tip in favour of the plaintiff. There being no evidence the plaintiff's financial predicament was due to the first defendant, the provisions of s 351 of the Companies Act operated. The SAR's decision was correct and the sum ordered as security for costs was reasonable given the facts (see para 43).

[Bahasa Malaysia summary]

Plaintif, yang memulakan tindakan ini dengan kebenaran likuidator, mendakwa bahawa defendan pertama dan kedua telah membuat representasi dan memberikan jaminan bahawa plaintif akan mempunyai hak eksklusif untuk menghasilkan dan membekalkan peti berpenyakit ('peti') untuk menyimpan ikan dan bahawa undang-undang akan digubal untuk menjadikannya wajib bagi golongan nelayan, pengimport, pembekal dan

- A peniaga untuk menggunakan peti tersebut. Plaintiff mendakwa bahawa dengan bergantung ke atas representasi/jaminan tersebut, dia telah membeli tanah dan peralatan, membina kilang, melantik kakitangan berkemahiran dan melaburkan dana-dana untuk menghasilkan peti tersebut. Plaintiff mendakwa
- B bahawa meskipun defendan-defendan telah menggubal undang-undang ('undang-undang subsidiari') yang memperuntukkan bahawa peti tersebut digunakan oleh orang di dalam industri perikanan seharusnya mengikut spesifikasi tertentu, iaitu, jenis yang dibuat oleh plaintiff, defendan-defendan kemudiannya memutuskan untuk tidak menguatkuasakan undang-undang subsidiari yang mewajibkan penggunaan peti atau membenarkan hak eksklusif
- C kepada plaintiff untuk menghasilkan dan membekalkan peti tersebut. Plaintiff mendakwa bahawa disebabkan kemungkiran representasi dan jaminan defendan-defendan, plaintiff mengalami kerugian kewangan yang serius dan mengakibatkan pengulungannya. Plaintiff menuntut terhadap
- D defendan-defendan untuk ganti rugi khas, kehilangan keuntungan dan ganti rugi am dan lain-lain. Defendan kedua dan ketiga memohon (melalui lampiran 9) untuk membatalkan tuntutan di bawah A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980, antara lainnya, atas alasan bahawa memandangkan defendan kedua merupakan pihak berkuasa tempatan, aduan plaintiff terhadap keputusannya hanya boleh dibuat secara betul dan sah melalui semakan kehakiman dan bukannya melalui tindakan writ. Untuk itu, plaintiff membalas bahawa dia tidak memohon untuk menyemak keputusan defendan-defendan yang tidak menguatkuasakan undang-undang subsidiari mahupun mempersoalkan hak mereka untuk menggubal undang-undang. Sebaliknya, tuntutannya bersifat undang-undang peribadi berdasarkan tort representasi cuai dan andaian kebertanggungjawaban di mana tindakan writ merupakan cara yang betul. Plaintiff juga memfailkan satu rayuan (melalui lampiran 16) terhadap keputusan timbalan pendaftar kanan ('TPK') yang mengarahkannya untuk menyediakan RM90,000 sebagai jaminan untuk kos menurut s 351 Akta Syarikat 1965 sebelum perbicaraan tindakan tersebut. Plaintiff menghujah bahawa memandangkan defendan pertama merupakan punca ia mengalami masalah kewangan pada awalnya, maka defendan pertama tidak seharusnya dibenarkan untuk mengambil kesempatan daripada situasi ini dengan mendesaknya untuk menyediakan jaminan untuk kos.
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Diputuskan, membenarkan lampiran 9 dengan kos dan menolak lampiran 16 dengan tiada perintah untuk kos:

- I (1) Apabila keseluruhan tuntutan plaintiff diteliti secara menyeluruh, didapati bahawa aduan plaintiff terhadap defendan-defendan adalah bersifat undang-undang awam. Tuntutan dan aduan seharusnya dikemukakan melalui semakan kehakiman. Ini bukannya perkara teknikal semata-mata tetapi berkenaan bidang kuasa. Fakta bahawa plaintiff telah memplidkan tuntutannya di dalam tort representasi cuai

- dan andaian kebertanggungjawaban tidak mengubah pertimbangan dan keputusan ini (lihat perenggan 17 & 19). A
- (2) Inti pati tuntutan plaintif ialah mengenai tindakan defendan-defendan berhubung undang-undang subsidiari dan bagaimana plaintif tidak menjadi pengeluar eksklusif dan pembekal peti. Kuasa untuk menggubal undang-undang, termasuk undang-undang subsidiari, jelas merupakan perkara-perkara berkenaan prinsip undang-undang awam. Meskipun terdapat gabungan undang-undang peribadi dan awam di dalam kes ini, aduan plaintif mengandungi elemen-elemen asas undang-undang awam (lihat perenggan 20 & 22). B C
- (3) Plaintif merupakan syarikat yang digulung dan terdapat keterangan mencukupi dan boleh dipercayai bahawa ia tidak berada di kedudukan yang mampu membayar kos defendan pertama sekiranya defendan pertama berjaya dalam mempertahankan tuntutannya dan diawardkan kos. Plaintif telah mempunyai hutang besar sebanyak RM145 juta dan boleh menerima yang ia tidak mampu membayar defendan pertama sekiranya defendan pertama berjaya (lihat perenggan 30). D
- (4) Dalam mengimbangi kepentingan kedua-dua pihak, mahkamah mendapati bahawa ia tidak berpihak kepada plaintif. Memandangkan tiada keterangan menunjukkan bahawa masalah kewangan plaintif disebabkan oleh defendan pertama, maka peruntukan s 351 Akta Syarikat berkuat kuasa. Keputusan TP adalah tepat dan jumlah yang diarahkan sebagai jaminan kos adalah munasabah mengikut fakta-fakta (lihat perenggan 43).] E F

Cases referred to

- Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)
- Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd) G
- Dalian Dragon Leader Import 8, Export Co Ltd v Ketua Pengarah Jabatan Perlindungan Hidupan Liar & Taman Negara, Menteri Sumber Asli & Alam Sekitar, Kerajaan Malaysia & Sunny K9 Sdn Bhd* (High Court at Kuala Lumpur No 21NCC-11 of 2010) (refd) H
- Haidakota (M) Sdn Bhd v Tan Tiam Chai* [2009] MLJU 654; [2009] 1 CLJ 699, CA (refd)
- Interfood Sdn Bhd v Arthur Anderson & Co & Anor* [2009] MLJU 334; [2009] 1 LNS 371, CA (refd)
- Keary Developments Ltd v Tarmac Construction Ltd & Another* [1995] 3 All ER 534, CA (refd) I
- North Plaza Sdn Bhd v United Securities Sdn Bhd* [2010] 1 MLJ 631, CA (refd)
- Northampton Coal, Iron and Waggon Company v Midland Waggon Company* (1878) 7 Ch D 500, CA (refd)

- A *O'Reilly v Mackman* [1983] 2 AC 237, HL (refd)
Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273, CA (refd)
Skrine & Co v MBf Capital Bhd & Anor [1998] 3 MLJ 649, CA (refd)

Legislation referred to

- B Companies Act 1965 s 351
Companies Act 1985 [UK] s 726(1)
Lembaga Kemajuan Ikan Malaysia Act 1971 ss 3, 23
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d), O 53
- C *Adam Abdullah (Fareez bin Zahir with him) (Adam Abdullah & Mani) for the plaintiff.*
Raja Ahmad Mohzanudin (Nazatul Sheera with him) (Azmi & Associates) for the first defendant.
Khairul Fazly Kamaruddin (Senior Federal Counsel) for the second and third defendants.

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Mary Lim J:

- E [1] The plaintiff is a company in liquidation. It was wound up pursuant to an order of court made on 28 January 2010. The liquidator has sanctioned the initiation of this action.

- F [2] There are two applications before me: encls 9 and 16. Enclosure 9 is the application of the second and third defendants to strike out the plaintiff's claim whereas encl 16 is the plaintiff's appeal against the learned SAR's decision ordering the provision of RM90,000 as security for the first defendant's costs under s 351 of the Companies Act 1965.

G SALIENT FACTS

- H [3] The plaintiff's claim relates to the production and supply of insulated fish crates for storing fish ('fish crates'). Pursuant to a letter dated 5 November 2003 copied to the second defendant, the first defendant is alleged to have offered the plaintiff on terms, the exclusive right to produce and supply these fish crates. The plaintiff accepted the offer and took steps towards fulfilment of the terms set out in the letter of offer. It attended meetings and entered into joint-venture agreements with third parties for this purpose.

- I [4] At the same time, the first and second defendants are said to have made oral and/or written representations or assurances to the plaintiff that laws providing for the mandatory use of these fish crates by fishermen, fish importers, fish suppliers and other persons related to this industry will be enacted. The defendants are also alleged to have represented that the plaintiff

will be the exclusive producer and supplier of these fish crates. In short, the legislation enacted will solely benefit the plaintiff. A

[5] Relying on the defendants' representations, the plaintiff bought land; built a factory as well as appointed skilled directors and management personnel; sourced financing and bought equipment, all for the production of such fish crates. The plaintiff also claimed to have invested profits from its automobile business into this new business. B

[6] The plaintiff's claim that the second and third defendants owe the plaintiff a duty of care to ensure that the legislation on the compulsory use of the fish crates be indeed enacted and enforced; and that the plaintiff did indeed have exclusive right to produce and supply these fish crates. In the statement of claim, these matters of 'menguatkuasakan undang-undang tersebut dan penggunaan wajib kotak-kotak ikan tersebut serta pelantikan eksklusif Plaintiff sebagai pembuat dan pengeluar kotak-kotak ikan tersebut' are described as 'tugas-tugas tersebut'. C D

[7] The plaintiff alleged that Peraturan-Peraturan Pemasaran Ikan 1973 (PU (B) 241) gazetted on 21 September 2006 were enacted by the defendants for this purpose. This subsidiary legislation provided for, inter alia, the specifications of the fish crates to be used. However, the date for the coming into force of this subsidiary legislation was postponed several times. E

[8] Around 9 March 2009, the second defendant is said to have announced that the defendants would not be enforcing the compulsory use of the fish crates. Fishermen and others related to this industry were also allowed to source their supplies from any supplier. In other words, the plaintiff no longer had exclusive right to produce and supply these fish crates. The subsidiary legislation earlier mentioned has since been brought into force. Other suppliers are now said to benefit from the legislation. The plaintiff alleged that this change of policy and the non-enforcement of the subsidiary legislation were for political reasons. F G

[9] It is the plaintiff's claim that the defendants were in a special relationship with the plaintiff by reason of the 'tugas-tugas tersebut'. The second and third defendants are said to have assumed responsibility with regards the 'tugas-tugas tersebut'. The plaintiff further claimed that the defendants knew or ought to have known that the plaintiff was relying fully on the powers, position and representations of the defendants in respect of the enforcement of the subsidiary legislation. In allowing other suppliers the right to produce and supply these fish crates, the plaintiff claimed that the defendants had acted contrary to their policies of encouraging Bumiputera companies like the plaintiff, and discriminated against the plaintiff. H I

A [10] By reason of the defendant's breaches and/or omissions, the plaintiff claimed to have suffered such severe financial losses that led to the winding-up of the plaintiff. It now claims, inter alia, special damages of RM267,144,694; loss of profits of RM4m per year since December 2009 from its automobile industry; general damages, investment damages and exemplary damages.

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ENCLOSURE 9

C [11] The second and third defendants filed an application to strike out the plaintiff's statement of claim pursuant to O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court.

D [12] According to the second and third defendants, the claim against them as being vicariously liable for the acts or omissions of the first defendant is misplaced as the first defendant has legal capacity to be sued under Lembaga Kemajuan Ikan Malaysia Act 1971 (Act 49). Further, there is no reasonable cause of action against these defendants because the power to make relevant laws is one entirely within the power of the defendants. Finally, the challenge of the decision of the defendants is one which rightly should be way of judicial review and not, by writ action. That being so, the claim is plainly and obviously unsustainable and ought to be struck out with costs.

F [13] Some preliminaries. The first issue concerning the first defendant is actually a non-issue. The first defendant is an individual sued in his capacity as the Director General of Lembaga Kemajuan Ikan Malaysia. While s 3 of the Act 49 confers legal capacity on the Lembaga to be used or to sue, there is nothing wrong with the first defendant, as the Director General of the Lembaga to be sued.

G [14] In his submissions, learned senior federal counsel for the second and third defendants argued that the second defendant, as the Minister in charge of the Lembaga, has powers to enact rules under s 23 of Act 49. The essence of the plaintiff's claim relates to the second defendant's purported oral/written representations to enact laws mandating the compulsory use of the fish crates; and the date for the coming into force of such laws in the event enacted. That being so, such a complaint against the second defendant is actually a complaint against a public authority. Such complaints can only be properly and validly brought by way of judicial review. The procedure for such an application is to be found under O 53 of the Rules of the High Court 1980.

I [15] The plaintiff contended otherwise. The plaintiff submitted that its claim is based upon the tort of negligent misrepresentation and the tort of assumption of responsibility. Its remedy is in damages which it had set out in

the appendix attached to the statement of claim. It is not seeking to review the decision of the defendants in not enforcing the relevant subsidiary legislation. Neither is it questioning the defendants' right to pass legislation. Its claim is private law and not public law based. In which case, this action is properly instituted.

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FINDINGS

[16] After reading the written submissions filed and after considering the oral submissions and the cause papers, I agreed with learned senior federal counsel.

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[17] When the whole of the plaintiff's claim is properly appreciated, it can be seen that the plaintiff's complaints against at least these defendants is predominantly housed in public law. The Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865 has been unequivocal as to how such claims are to be handled and treated. The claim and the complaints must be brought by way of judicial review. This is not a matter of mere technicality but jurisdiction. In *Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan & Kesenian Johor & Ors* pp 172–173 (MLJ); at p 890 (CLJ), after having very carefully examined the leading cases in this respect, the Federal Court observed and concluded that:

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... a challenge on the use of appropriate procedure is very much fact-based. Thus, it is necessary for a judge when deciding on such a matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambry. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be way of O 53 of the RHC to proceed in another form. To say it is open to an applicant seeking judicial review to elect any mode he prefers, as implied in *Kuching Waterfront*, would, in our considered opinion, be rendering O 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration, then this rule must be adhered to, except in the limited and exceptional circumstances discussed.

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- A [18] In the case of *Dalian Dragon Leader Import 8, Export Co Ltd v Ketua Pengarah Jabatan Perlindungan Hidupan Liar & Taman Negara, Menteri Sumber Asli & Alam Sekitar, Kerajaan Malaysia & Sunny K9 Sdn Bhd* (High Court at Kuala Lumpur No 21NCC-11 of 2010); Mohamad Ariff J similarly struck out the writ action on the basis that the proper procedure must be way of judicial review on policy grounds as expressed in *O'Reilly v Mackman* [1983] 2 AC 237. His Lordship opined that the objection raised by the senior federal counsel was not merely technical but was an objection on jurisdiction:
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- C In a proper case, a non-reliance on O 53 procedure can therefore constitute an abuse of process of the court. Where a suit raises a public law issue, it will be an abuse of process not to commence an action under O 53. The reasoning underpinning this legal position has been aptly described by the Court of Appeal in *Dato' Seri Anwar Ibrahim* thus:

- D This suit raises public law issues as it is a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution that is being impugned. As such a decision taken by the Prime Minister with regard to a Minister as a member of the administration in his public duties is one which has implications for the public as a whole and it is in consequence of this that the public law is concerned with the decision-making process. The legal sources of the powers that are being impugned are in the public domain. As such to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority in this case the Federal Government and in the circumstances of the present case, of the protection of the law that it is entitled to by the processes available under O 53.
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- F [19] From the statement of claim and the affidavits filed, it is my view that the plaintiff's case against the second and third defendants is one which must be initiated by way of judicial review. The fact that the plaintiff has pleaded its claim against these defendants in the tort of negligent misrepresentation and the assumption of responsibility does not alter this consideration and finding. This is because of the facts and circumstances upon which this claim is founded. This will make it clearer.
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- H [20] When the plaintiff's claim is pared down to its fundamentals, it become obvious that the essence of the plaintiff complaints is about the, defendants' actions in relation to the subsidiary legislation and how the plaintiff is not the exclusive producer and supplier of the fish crates. The power and authority to enact laws, including subsidiary legislation are patently matters concerning principles of public law. Assuming for a moment that the second defendant, as the Minister in charge of this portfolio did indeed make the representations alleged; the plaintiff's allegations will definitely call into scrutiny the second and third defendants' powers, duties and responsibilities in relation to statute making; how and why those powers, duties and responsibilities are exercised or not exercised. Such a scrutiny necessarily involves issues of public law as
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law-making impacts the public even if it is alleged to be intended to benefit a single individual. More so now when the subsidiary legislation is in force and other suppliers' interests will be affected. In *O'Reilly v Mackman*, Lord Diplock recognised that 'there may be exceptions, particularly where the validity of the decision arise as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons'. In my view, the matters relating to the enactment and date of coming into force of the subsidiary legislation are not collateral but central or core issues here.

[21] I do not find the facts and circumstances of this pleaded case such as to warrant it to be an exceptional case where that rule of jurisdictional procedure can be departed from. This becomes more plain and obvious when the third defendant, the Government of Malaysia is added to the equation. There is nothing specifically against the third defendant save for being vicariously liable for the actions or representations purportedly made by one of its Ministers, the second defendant.

[22] Even if it can be said that there is a mixture of public and private law in this case, it is my judgment that the plaintiff's complaints necessarily contain substantial elements of public law. It is difficult to see from the nature of the plaintiff's complaints how these complaints can be matters or issues concerning private law. The claim therefore falls squarely within the category of cases that must be brought by way of judicial review.

[23] This is also not a matter of the plaintiff's choice. It is not up to the plaintiff to decide how it wants to challenge the defendants in this regard. These are matters of public law where specific procedure has been prescribed for such challenges. This rule must be adhered to strictly as it 'is in the interest of good administration'. Otherwise, as the Federal Court said in *Ahmad Jefri Mohd Jahri*, O 53 would be rendered 'redundant'.

[24] In the circumstances, this is a suitable and appropriate case to be struck out under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980. This claim plainly and obviously ought to be struck out as decided in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7. The second and third defendants' application as found in *encl 9* is therefore allowed with costs of RM350.

ENCLOSURE 16

[25] This is an appeal against the decision of the learned SAR who had ordered that the plaintiff provide RM90,000 as security for costs of the first defendant. This sum was to be paid within 14 days from 14 February 2012.

- A The learned SAR further ordered that all further action against the first defendant be stayed pending provision of that security. In support of his application, the first defendant caused his solicitors to prepare a draft bill of costs which showed that the first defendant's potential costs to be in the region of RM350,000. The parties have filed affidavits and counter affidavits in relation to this application. These affidavits have been taken into consideration in coming to my decision.

[26] The relevant provision for consideration is s 351 of the Companies Act 1965. It reads as follows:

- C 351(1) Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the Defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.
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- [27] This section provides the court with discretion as to whether or not to order that security for costs be provided by a company that has been wound up. In *Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649, the Court of Appeal was of the view that s 351 '... provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. The first step is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful Defendant'. This approach was followed by the Court of Appeal recently in *North Plaza Sdn Bhd v United Securities Sdn Bhd* [2010] 1 MLJ 631.
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- G [28] In North Plaza, the Court of Appeal expressed views similar to those first stated by Jessel MR in *Northampton Coal, Iron and Waggon Company v Midland Waggon Company* (1878) 7 Ch D 500 at p 503, that the 'fact of the plaintiff company being in liquidation would be sufficient 'reason to believe' the assets to be insufficient unless evidence to the contrary was given'. Speaking for the Court of Appeal, Mohd Hishamudin JCA said at p 642:
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- I Based on the above principle, and considering that the respondent had been wound up by the court, there is, therefore, reason to believe that the respondent would be unable to pay the costs of the appellant if the latter were to be successful in their defence — unless evidence to the contrary is given by the respondent. The inquiry then would be: has the respondent given any evidence to the contrary? We must say that we are unable to find any credible evidence to the contrary.

[29] The first defendant had prepared two draft bills of costs; one in

anticipation of a striking-out application (approximately RM30,000), the other in relation to his costs upon completion of a full trial (approximately RM226,000). The first defendant has expressed prejudice and difficulties in recovering costs against the plaintiff in the event his defence is successful. In my view, having examined it, I find that these bills are not unrealistic estimation of the first defendant's costs. The plaintiff's monetary claim as expressed in the statement of claim is already fairly substantial. The issues of law involved in this claim are not issues routinely seen and are potentially complex. In any case, I observed that the plaintiff does not appear to suggest otherwise.

[30] Here, it is quite apparent that the two conditions mentioned in *Skrine & Co v MBf Capital Bhd* are undisputedly fulfilled. The plaintiff is a wound up company. There is ample credible evidence that the plaintiff would not be in the position to settle the first defendant's costs in the event the first defendant is successful in defending the claim and is awarded costs after a trial on merits. As far as the corporate financial health of the plaintiff is concerned, it already has substantial debts in the region of RM145m. In fact, the plaintiff accepts that it will be unable to pay the first defendant, if he is successful. There is therefore no credible evidence before the court that the plaintiff will be able to settle the first defendant's costs in the event he is successful in his defence.

[31] Generally, that would settle an application for security for costs under s 351 of the Companies Act 1965. This is not one of those cases. It is the plaintiff's contention that the reason why it is in its present predicament, that it was wound up is precisely because of the first defendant's default or breaches. But for the first defendant's defaults or breaches, the plaintiff would not be financially straitened or find itself wound up. And, it is for those breaches and defaults that the plaintiff is now making its claim.

[32] The pertinent question to ask next is whether the court should consider any other factors once the two stage inquiry mentioned in *Skrine & Co v MBf Capital Bhd* have been met. The plaintiff referred to an unreported decision of the Court of Appeal in *Interfood Sdn Bhd v Arthur Anderson & Co & Anor* [2009] MLJU 334; [2009] 1 LNS 371 in support of its contention that the culpability of the defendant must be taken into consideration. What the plaintiff contended is that if the defendant was responsible for the plaintiff's financial predicament in the first place, the defendant must not be allowed to take advantage of the Plaintiffs situation and insist on the provision of security for costs.

[33] In its judgment given orally in *Interfood Sdn Bhd v Arthur Anderson & Co & Anor*, the Court of Appeal echoed its earlier decision in *Haidakota (M) Sdn Bhd v Tan Tiam Chai* [2009] MLJU 654; [2009] 1 CLJ 699 which reviewed 'some of the principles that broadly guide the exercise of discretion'

- A under s 351 of the Companies Act 1965. Those guiding principles may be summarised as follow:
- (a) an application for security for costs must be made with sufficient promptitude after the issue of the writ;
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- (b) an order directing the provision for security should not generally be made where the making of it would be oppressive, especially where the Plaintiff has an arguable case;
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- (c) such an order should not be made where there is an absence of mala fide on the part of the plaintiff in bringing the claim; and
 - (d) special attention should be paid to the balance between exposing an innocent defendant to the expense of defending a claim against shutting out a plaintiff from ventilating a genuine grievance.
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- [34] After examining the circumstances in *Interfood Sdn Bhd*, the Court of Appeal found that one of the most important factors in the claim had been overlooked by the High Court. That factor was that the respondent had aided and abetted or assisted one of the directors to commit acts of breach of trust which led to the appellant suffering loss. That being so, the appeal was then
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- [35] The Court of Appeal also recognised in *Haidakota v Tan Tiam Chai* that s 351 of the Companies Act 1965 actually ‘confers a very wide discretion on the High Court to order a company to provide security for costs in any action brought by it or against it’. Quoting Lord Denning in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273, the Court of Appeal opined that ‘if there is reason to believe that the company cannot pay the costs, then the security may be ordered, but not must be ordered’. It is the circumstances of the
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- particular case which will occasion the exercise or otherwise of this wide discretion.
- [36] In this respect, I find the English Court of Appeal’s decision in *Keary Developments Ltd v Tarmac Construction Ltd & Another* [1995] 3 All ER 534, helpful. Here, the Court of Appeal recognised Parliament’s intent in enacting s 726(1) of the Companies Act 1985 which is substantially similar to s 351 of the Malaysian Companies Act 1965; that the exercise of discretion under s 726(1) is conditional on the court being shown that the company is one likely to be unable costs awarded against it. The Court of Appeal further recognised the ‘balancing exercise’ that the court has to carry out; balancing the injustice to a plaintiff pursuing a proper claim against a defendant who is unable to recover the costs properly incurred in successfully defending the claim brought. But, there was something else that the Court of Appeal pointed out which I feel appropriate for the facts of this case. And, it is this — that the courts must ‘also
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be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company’.

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[37] This is important for otherwise it would be somewhat easy and convenient for a wound up plaintiff company who is unable to pay costs of a successful defendant to make such a claim and avoid payment. At the end of the day, the court will have to evaluate whether the claim of the plaintiff is devoid of bad faith and is genuine. When looking at the claim, the court must also have regard to the plaintiff’s prospects of success. It must be impressed that the court is not, at this point, exploring the merits of the plaintiff’s claim in detail ‘unless it can be clearly demonstrated that there is a high degree of probability of success or failure’. At p 540 of *Keary Developments Ltd*, the Court of Appeal further cautioned that ‘Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled’.

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[38] With the concession of the plaintiff as to its liquidity, the focus here shifts to the first defendant, whether it is indeed true that it is his act or breach which placed the plaintiff in a financially straitened position. If the answer is in the affirmative, then the court may refuse or be less inclined to make the order sought.

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[39] From the statement of claim and from the facts already set out earlier in respect of *encl 9* (the second and third defendants’ application to strike out), the allegations against the first defendant are similar to those made against the second and third defendants. The plaintiff claimed that the first defendant had made oral and/or written representations on the enactment and bringing into force of specific legislation for the mandatory use of fish crates; and the appointment of the plaintiff as the exclusive producer and supplier of such crates. The first defendant is alleged to have failed to ensure that those representations are kept and met. When the date of coming into force of the subsidiary legislation was postponed several times for allegedly political reasons; and when there was a change in policy in the production and supply of the fish crates such that the plaintiff was not the exclusive producer and supplier of the fish crates; the plaintiff claimed that it suffered loss and damage. The first defendant is liable for the plaintiff losses because he is said to have known that the plaintiff had invested all its profits from its automobile business into that for the production and supply of the fish crates.

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A [40] All these allegations are denied and disputed by the first defendant. In particular, he denies having anything to do with the plaintiff's financial position.

B [41] After carefully scrutinising the statement of claim and the affidavits filed, I do not find any co-relation between the plaintiff being wound up and the allegations of breach and default on the part of the first defendant. The plaintiff was wound up pursuant to some debts that it owed to some third party. That third party had sued the plaintiff in the High Court at Shah Alam (High Court Suit No N4T5-22-703 of 2009) and had procured a judgment in default of appearance on 30 July 2009. There are no allegations made or evidence presented to show that those debts owed to the third party had anything to do with the first defendant. In fact, there is no evidence to show that the plaintiff had intimidated to the third party that it was unable to settle its debts because of the first defendant's acts; or that it was awaiting settlement of its debts by the first defendant before it could pay the third party. There is nothing to relate the two incidents together. The plaintiff has also made no efforts to contest or set aside, be it, the default judgment or the winding-up order. Yet, it alleges today that its present predicament is brought about by the first defendant. I find that extremely difficult to accept.

E [42] I further do not find the plaintiff to have made a genuine arguable case. It is not as if with the subsidiary legislation the plaintiff is prohibited from producing and supplying the crates. On the contrary, I find present the observations made in *Keary Developments Ltd* that this court should not be '... so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company'. At the same time, I am satisfied that in ordering security to be provided, a valid claim is not being unfairly stifled as '... in all the circumstances, it is probable that the claim would be stifled'.

G [43] Accordingly, in balancing the interests of the two parties, I am compelled to find that the balance does not tip in favour of the plaintiff. There being no evidence that the plaintiff's financial predicament was ever due to the first defendant, the provisions of s 351 operate. The decision of the learned SAR is therefore correct. The sum ordered is reasonable given the facts and I so dismiss this appeal with no order as to costs.

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Enclosure 9 allowed with costs and encl 16 dismissed with no order as to costs.

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Reported by Ashok Kumar

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